Kho Tian Boo v Tengku Ibrahim Petra bin Tengku Indra Petra

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D-22NCC-49 OF 2010
MOHAMAD ARIFF J
17 JUNE 2011

Evidence — Witness — Compellability — Witness was party to litigation — Witness suffered from severe depressive disorder due to ongoing trial — Whether witness compelled to be cross-examined

The plaintiff was an 80 year old man who had a history of mental depression since 1969. He was a litigant and a witness in the present suit and during trial, he suffered a relapse of a severe depressive disorder ('disorder'), making him unable to proceed to the cross-examination stage. The question before the court was whether the plaintiff was compellable to be cross-examined in view of him suffering from the disorder. Two psychiatric reports were produced before the court by both counsel. Dr Tan ('PW3'), an expert witness for the plaintiff gave evidence that the disorder was precipitated by the instant suit and he should have been exempted from attending the court. According to PW3, there were no other alternatives to continue with the cross- examination ie via a video link. Expert witness for the defendant, Dr Prem ('DW1') agreed that the instant suit was the 'triggering factor'. The plaintiff's counsel submitted that as stipulated by s 118 of the Evidence Act 1950 ('Act'), the plaintiff was not a compellable witness. As a litigant, he may elect not to give evidence and the defendant can then resort to any adverse inferences under s 114 of the same Act. It was also the plaintiff's counsel contention that there was no existing statutory provision that allowed a party to apply to the court to strike out a writ or expunge an evidence in chief if a witness had not completed his cross-examination. The defendant's counsel argued that the plaintiff was a competent witness as s 118 of the Act prescribed that a witness shall be regarded as competent if he can give rational answers. In suggesting that a video link can be employed to accommodate the cross-examination, the defendant's counsel further argued that since s 3 of the Interpretation Act 1967 ('IA') did not limit the 'physical appearance' of a 'court', a 'court' may therefore mean other locations such as the plaintiff's house.

Held:

(1) Assuming that the plaintiff was a competent witness, the law was well-established that the plaintiff was not compellable to come to the court as a witness since he was also the party to the litigation. A party had the right as to whom he wanted to call as his witness. To agree with the

defendant's submission that s 118 of the Act extended to a party to litigation would be to upset the adversarial system of litigation (see para 16).

(2) The plaintiff had a proven medical history of depressive disorder. It was agreed that the triggering cause of his present disorder was the present ongoing trial. The trial can still proceed without the plaintiff where the plaintiff may elect not to proceed with the cross-examination but the prejudice will nevertheless be on him. The weight to be attached to the plaintiff's testimony will be a matter for the court's assessment after hearing submissions of both counsel (see para 16).

(3) Although the physical location or normal attributes of a 'court' was not defined by s 3 of the IA, it was not the issue to be comprehended or decided by the court. The physical location was not the critical issue as it was the entire atmosphere and the questions asked in a trial environment that triggered his disorder (see para 17).

[Bahasa Malaysia summary

Plaintif adalah lelaki tua berumur 80 tahun yang mempunyai sejarah tekanan mental semenjak 1969. Dia adalah litigan dan saksi di dalam tindakan ini dan semasa perbicaraan, dia mengalami kambuh gangguan kemurungan yang teruk ('gangguan'), membuatkan dia tidak dapat meneruskan ke peringkat pemeriksaan balas. Soalan di hadapan mahkamah adalah sama ada plaintif boleh dipaksa untuk diperiksa balas memandangkan dia mengalami gangguan tersebut. Dua laporan psikiatrik dikemukakan di hadapan mahkamah oleh peguam kedua-dua pihak. Dr Tan ('PW3'), saksi pakar untuk plaintif memberikan keterangan bahawa gangguan tersebut dipercepatkan oleh tindakan ini dan dia patut dikecualikan daripada menghadiri mahkamah. Mengikut PW3, tidak terdapat alternatif lain untuk meneruskan dengan pemeriksaan balas iaitu menerusi 'video link'. Saksi pakar untuk defendan, Dr Prem ('DW1') bersetuju bahawa tindakan ini adalah 'triggering factor'. Peguam plaintif berhujah bahawa seperti yang ditetapkan oleh s 118 Akta Keterangan 1950 ('Akta'), plaintif bukan saksi yang boleh dipaksa. Sebagai litigan, dia boleh memilih untuk tidak memberi keterangan dan defendan boleh merujuk kepada mana-mana inferens bertentangan di bawah s 114 Akta yang sama. Adalah juga hujahan peguam plaintif bahawa tidak terdapat peruntukan statutori yang wujud yang membenarkan pihak memohon kepada mahkamah untuk membatalkan writ atau memotong keterangan utama jika saksi tidak menyelesaikan pemeriksaan balasnya. Peguam defendan berhujah bahawa plaintif adalah saksi kompeten memandangkan s 118 Akta menjelaskan bahawa saksi boleh dianggap sebagai kompeten jika dia boleh memberikan jawapan yang rasional. Dalam mencadangkan bahawa 'video link' boleh digunakan untuk menampung pemeriksaan balas, peguam defendan selanjutnya berhujah bahawa memandangkan s 3 Akta Tafsiran 1967 ('AT')

tidak menghadkan 'physical appearance' sesuatu 'court', 'court' mungkin oleh itu bermaksud lokasi lain seperti rumah plaintif.

Diputuskan:

(1) Dengan menganggap bahawa plaintif adalah saksi kompeten, undang-undang adalah nyata bahawa plaintif tidak boleh dipaksa untuk datang ke mahkamah sebagai saksi memandangkan dia juga adalah pihak kepada litigant. Pihak mempunyai hak terhadap siapa dia hendak memanggil sebagai saksinya. Untuk bersetuju dengan hujahan defendan bahawa s 118 Akta dilanjutkan kepada pihak kepada litigasi akan mengganggu sistem pertentangan litigasi (lihat perenggan 16).

(2) Plaintif mempunyai sejarah perubatan yang terbukti mengenai gangguan tekanan. Ia dipersetujui bahawa sebab pencetusan gangguan sekaranganya adalah perbicaraan yang berterusan sekarang. Perbicaraan boleh masih diteruskan dengan pemeriksaan balas tetapi prejudis akan masih terletak ke atas plaintif. Beban yang dikenakan kepada testimoni plaintif adalah perkara untuk penilaian mahkamah selepas mendengar hujahan-hujahan peguam kedua-dua pihak (lihat perenggan 16).

(3) Walaupun lokasi fizikal atau sifat-sifat biasa sesuatu 'court' tidak didefiniskan oleh s 3 AT, ia bukan isu untuk difahami atau diputuskan oleh mahkamah. Lokasi fizikal bukan isu kritikal memandangkan ia adalah suasana keseluruhan dan soalan-soalan yang ditanya di dalam persekitaran perbicaraan yang mencetuskan gangguannya (lihat perenggan 17).]

Notes

For cases on compellability, see 7(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 2998–2999.

Cases referred to

Datin Siti Hajar v Murugasu [1970] 2 MLJ 153 (refd)

Diwan Singh v Emperor AIR 1933 Lah 561 (refd)

Dr Shanmuganathan v Periasamy s/o Sithambaram Pillai [1997] 3 MLJ 61; [1997] 2 CLJ 153, FC (refd)

Ghouse bin Hj Abdul Kader Mustan v Rex [1946] 1 MLJ 36 (refd)

Kee Lik Tian v PP [1984] 1 MLJ 306 (refd)

Mt Horil Kuer & Anor v Rajab Ali & Ors AIR 1936 Patna 34 (refd)

PP v Yuvaraj [1969] 2 MLJ 89, PC (refd)

Royal Brompton Hospital v Hammond & Ors [2002] EWHC 2037, HC (refd)

Wong Sun v Insider Dealing Tribunal (CACV 153/2000), CA (refd)

Legislation referred to

Evidence Act 1950 ss 114, 114(g), 118
Interpretation Acts 1948 and 1967 s 3

Wong Kian Kheong (Ng S Seng, Raja Syarafina, KT Ng and Tan Lei fen with him) (Chris Lim Ting & Partners) for the plaintiff.
Ranjit Singh (Razlan Hadri and Yeoh Cho Keong with him) (Ranjit Singh & Yeoh) for the defendant.

Mohamad Ariff J:

RULING (ON WHETHER THE PLAINTIFF (DW1) SHOULD CONTINUE TO BE SUBJECT TO CROSS-EXAMINATION)

INTRODUCTION

[1] I had commenced this suit in August 2010 with the plaintiff's examination-in-chief as PW1. The examination-in-chief was completed on 6 August 2010. The cross-examination of the plaintiff followed on the same day and subsequently adjourned to another date. The parties were at the stage of proceeding with the continued cross-examination of the plaintiff when the plaintiff suffered a serious depressive disorder.

ISSUE: CAN THE PLAINTIFF BE COMPELLED TO BE CROSS-EXAMINED ALTHOUGH SUFFERING FROM SEVERE DEPRESSIVE DISORDER?

[2] The plaintiff is and 80-year-old man with a history of mental depression since 1969. A medical report was submitted at the adjourned hearing indicating that the plaintiff was unfit to continue to stand trial. It has to be noted that even in the early stage of his examination-in-chief, and the cross-examination, his personal doctor (Dr Tan Chue Tin, PW3) had produced a report recommending that the plaintiff be required to give evidence only during the morning session, although the doctor then stated that he was otherwise fit to stand trial. I am here referring to PW3's first report in which Dr Tan give the opinion that the plaintiff was of sound mind and 'fit to engage in a trial proceeding', with a further strong recommendation that the plaintiff should only be involved in the morning session of the court proceeding, and not to be subjected to 'hostile' or 'aggressive' cross-examination.

[3] I had then fixed seven trial dates from September–November 2010 for continuation of the trial, but the trial could not proceed on these dates because of the plaintiff's condition. Two medical certificates were tendered at this stage,

namely one by Dr Brian Yeo and another by Dr Tan. Dr Tan's medical certificate mentioned that the plaintiff would be unfit to stand trial until early November 2010.

[4] The trial was supposed to have resumed subsequently on 9 November 2010 with the continued cross-examination of the plaintiff. Counsel for the plaintiff then informed the court that the plaintiff was still suffering from severe depressive disorder and could not continue to be cross-examined.

[5] At this stage, counsel for the defendant informed the court that the defendant would request the plaintiff to be examined by the defendant's own doctor. In the result, I have been provided with two psychiatric reports — one by Dr Tan and the other by Dr Prem Kumar Chandrasekaran, the defendant's expert. Dr Tan's psychiatric report is dated 18 November 2010, while Dr Prem Kumar's report is dated 20 January 2011. Both experts were called as witnesses to provide the necessary testimony on the medical condition of the plaintiff.

[6] Let me say this at the outset. Both psychiatrists have impressive credentials, and both reports have been extremely helpful to me in coming to this ruling on the narrow issue whether the plaintiff should continue the cross-examination in the interest of bringing this suit to a speedy conclusion.

[7] Mr Wong Kian Kheong, the plaintiff's counsel, made it plain that his instructions from the family is they do not want to subject the plaintiff, an 80-year-old man in a poor medical condition, to continued cross-examination. Given his medical condition, he should not be made to undergo that further cross-examination. Counsel relied on the psychiatric reports of the two experts. Counsel submits DW1, as the plaintiff, cannot be compelled to give evidence in any event, given our adversarial system of litigation. A party to litigation can to elect who he wishes to call as a witness; the law cannot compel the party to do otherwise. And this principle extends to the present case, where a party, by reason of medical infirmity can elect not to continue with his cross-examination. The effect of such refusal will be a matter going to the weight of the evidence already received, and may be the subject matter of any adverse inference to be drawn by the opposing party. Encik Razlan, counsel for the defendant, on the other hand, maintains his position that PW1 is both a competent and compellable witness by virtue of the Evidence Act 1950, specifically s 118 of the Act. As such PW1 should be compelled to be cross-examined. However, the manner and place of the cross-examination may be modified or adjusted to accommodate the medical condition faced by the witness.

[8] I now turn to look at the detail submissions of each party.

THE PLAINTIFF'S GROUNDS

[9] Counsel for the plaintiff states the factual matrix in this case here is

narrow and, in the main, not disputed. The plaintiff suffered a fourth depression after the first day of cross-examination on 6 August 2010. That is credible medical evidence to show the plaintiff should not be subject to the giving of further evidence through strenuous cross-examination. This court cannot compel a party to continue with cross-examination, even if this court rejects the medical evidence. Further, in the event the plaintiff is not required to undergo the continued cross-examination, there will be no real prejudice to the defendant. The prejudice will be to the plaintiff, not the defendant. Justice, law and policy support the continuation of a trial without necessarily subjecting the plaintiff to the continued cross-examination. As for the credible medical evidence, Mr Wong refers in particular to the psychiatric report of Dr Tan, PW3, who is a highly qualified psychiatrist serving at Mount Elizabeth Hospital in Singapore. Looking at the medical history of the plaintiff, he has suffered, over the years, four depressions. The first depression occurred in 1969, the second in 2000, the third in 2006 and the fourth in September 2010 after the first day of cross-examination in this very suit. PW3 has given evidence that the fourth depression was precipitated by this suit. Even Dr Prem, DW1, has admitted in his evidence that the 'triggering factor' appears to be this instant suit. It is also the opinion of PW3 that the plaintiff is unlikely to recover sufficiently in the near future. If he is subject to further cross-examination, there is a high probability of the plaintiff suffering 'dissociative symptoms'. DW1 also agreed with PW3 in this respect. According to DW1 there will be a risk of 'conversion episode' or suicidal tendency. The plaintiff has thus far been treated by four senior psychiatrists. As for the first depression, the plaintiff took ten years to recover. PW3 was firm in his views during his cross-examination, and according to PW3, the only way to avoid a relapse or worsening of the plaintiff's medical condition, will be to exempt the plaintiff from attending court. PW3 disagrees with any alternative method that might be employed to facilitate the continued cross-examination, for instance via a video link. According to PW3 it is the nature of the questions that is in issue and the method adopted presumably will not avoid the effects on the plaintiff. According to Mr Wong, counsel for the plaintiff, even DW1 is of the view that it was not right to put the plaintiff on the stand. As far as his medical history is concerned over the years, the plaintiff has been given thus far a total of 17 electroconvulsive therapy ('ECT'). The plaintiff has been prescribed four different types of anti-depressant drugs belonging to three major classes. On the law on whether the plaintiff can be compelled to undergo cross-examination, Mr Wong submits it is trite that the plaintiff, as a litigant, may elect not to give evidence. Section 118 of the Evidence Act does not render the plaintiff a compellable witness. In any event, if the plaintiff elects not to undergo further cross-examination, the defendant can always resort to any adverse inference under s 114(g) of the Evidence Act or he can submit no case to answer at the close of the plaintiff's case. Counsel refers to a number of case authorities spanning several jurisdictions to illustrate the point. The case of *Dr Shanmuganathan v Periasamy s/o Sithambaram Pillai* [1997] 3 MLJ 61; [1997]

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2 CLJ 153 was cited for the proposition that a trial can still be continued despite the non-attendance of a witness in midstream. On the facts of this case, for example, a material witness disappeared without completing his testimony. This material witness had been cross-examined, but on the date fixed for his continued cross-examination, he absconded and could not be found. The trial nevertheless proceeded. The following passage in the Federal Court judgment is relevant for our present purposes:

> Particular reference must be made to the evidence of DW1. His evidence is very material to prove the genuineness of the will. Unfortunately his evidence was never completed. Whilst DW1 was under cross-examination on the will the hearing was adjourned, and when the case came for continued hearing. DW1 was missing. The learned judge in dealing with this situation allowed that part of the evidence as to show the absence of DW1. The learned judge however did not allow the evidence of DW1's character. In his judgment the learned judge said:
>
> > The court would also not draw any inference of fact or against the credibility of Mr Wong just solely by virtue of his absence from his office and the newspaper reports about his alleged involvement in a criminal case.
>
> The learned judge further in his grounds of judgment stated that 'the usual way to injure a witness's credit is while the witness is still in the witness box under cross examination'. it seems that the learned judge had ignored the fact that DW1 absconded in the course of cross examination and thereby prevented the plaintiff from either injuring DW1's credit or from putting his case to the witness. The learned judge however, correctly pointed out that:
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> > Under s 155(a), the credit (credibility) of a witness can be injured by calling any other witness to the box to testify that from his knowledge, the first mentioned witness is unworthy of credit.
>
> Unfortunately, it would appear that the learned judge did not consider the evidence of DW2 and PW3 who testified that DW1, an advocate and solicitor, absconded because of police investigation on some CBT matters. Nor was any consideration given to the unchallenged evidence of PW2 that the Bar Council was compelled to take over DW1's office by reason of DW1 and his partner having absconded. The legal effect on an incomplete cross-examination is a very serious question which the court ought to consider in arriving at any decision.
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> In his judgment the learned judge relied on the principles enunciated in *Browne v Dunn* [1893] 6, The Report 67 (HL). The learned judge cited a passage from the judgment of Lord Halsbury which is reproduced below:
>
> > To my mind nothing would be more absolutely unjust than not to cross-examine witnesses upon evidence which they have given so as to give

> them notice, and to give them an opportunity of explanation and an opportunity very often to defend their own character.

With respect the learned judge failed to appreciate that the cross-examination of DW1 was not completed. It must be noted that in the course of cross-examination, DW1 had absconded and therefore the plaintiff was prevented from either putting his case or injuring DW1's credit.

…

It is imperative for the court to consider what is the legal effect of cross examination which, could not be completed. A passage in the *Halsbury*'s, (4th Ed), Vol 17, para 277 reads:

> Any party is entitled to cross examine any other party who gives evidence and his witnesses, and no evidence affecting a party is admissible against that party unless the latter had an opportunity of testing its truthfulness by cross-examination.

The question which arises here is whether there was an opportunity afforded to the plaintiff to test the truthfulness of the evidence of DW1 by cross examination. Needless to say such an opportunity must be a real opportunity.

The right to cross-examination is not enough; there must be opportunity to exercise the right (opportunity is equivalent to actual cross-examination) see *Sarkar on Evidence*, (14th Ed), at p 1998. At p 1999, Sarkar said:

> When a witness dies after examination in chief and before cross examination the evidence is admissible, but its probative value may be very small and may even be disregarded. If the examination is substantially complete and the witness is prevented by death, sickness or other causes (mentioned in s 33) from finishing his testimony, it ought not to be rejected entirely …

But if not so far advanced as to be substantially completed, it must be rejected.

…

In *Mt Horil Kuer & Anor v Rajab Ali & Ors* AIR 1936 Patna 34 it was held that the weight to be attached to the evidence depends on the circumstances and the court should look whether there are indications that by a completed cross-examination, the testimony of the witness was likely to be seriously shaken or his good faith to be successfully impeached Rowland J, in that case held:

> This decision which was followed in [1929] Lah 840 (7) seems to me, if I

> may say so with respect, to state the law correctly. I do not understand the observations of the learned judge to mean that there is any hard and fast rule that the probative value of such evidence is small, and in my view there is no such rule. The weight to be attached to the evidence depends on the circumstances and the court should look at the evidence carefully to see whether there are indications that by a completed cross examination the testimony of the witness was likely to be seriously shaken or his good faith to be successfully impeached.

As observed in an American case cited at p 330 of *Sarkar's Law of Evidence*, (5th Ed):

> No general rule can be laid down in respect of unfinished testimony. If substantially complete and the witness is prevented by sickness or death or other causes (mentioned in s 33of the Evidence Act) from finishing his testimony whether viva voce or by deposition, it ought not to be rejected entirely, but submitted to the jury, with such observations as the particular circumstance may require.

But if not so far advanced as to be substantially complete, it must be rejected …

[10] Counsel also quotes the Indian case of *Diwan Singh v Emperor* AIR 1933 Lah 561 and *Mt Horil Kuer & Anor v Rajab Ali & Ors* AIR 1936 Patna 34, which are also cases cited with approval by our Federal Court in *Dr Shanmuganathan v Periasamy s/o Sithambaram Pillai*. The English decision in *Royal Brompton Hospital v Hammond & Ors* [2002] EWHC 2037 is quoted as further support to justify the position that a court can proceed without a witness necessarily having to complete his testimony. In the *Royal Brompton Hospital* case, it appears that one key witness could not attend court for cross-examination because he was unwell — the evidence suggested he was suffering from anxiety. It also appeared from the report that his doctor was firmly against him being cross-examined. The English High Court declined to draw the inference that his evidence should not be accepted at all:

> I therefore decline to draw the inference, from the grounds relied on by (the opposing party) that Mr Edward's views should not be accepted at all, although in the circumstances it is not possible to give much weight to them where they were in issue, as they required to be justified by him, especially in the light of Mr Dix's evidence.

[11] Counsel, however, is also quick to add that no statutory provision exists allowing a party to apply to court to strike out a writ or expunge an evidence in chief on the ground that a witness has not completed his cross-examination. On s 118 of the Evidence Act and the argument that PW1 is a compellable witness, the plaintiff's counsel argues that this section governs only the issue of

the competence of a witness and cannot be read as altering the adversarial nature of litigation. The case of *Ghouse bin Hj Abdul Kader Mustan v R* [1946] 1 MLJ 36 and *Kee Lik Tian v Public Prosecutor* [1984] 1 MLJ 306 are cited in support.

[12] In *Kee Lik Tian v Public Prosecutor*, Edgar Joseph Jr (as he then was) spoke of the adversarial system which our system adopts in the context of a refusal by the sessions court judge to allow the complainant in a rape case to be subject to a psychiatric report, in the following terms:

> The refusals aforesaid prevented the appellant from exercising a statutory right and its effect might well have been to sever a vital artery of evidence thus offending the elementary ideas of the adversarial system of justice to which our courts subscribe. Illustrations of the application of this principle are to be found in the cases of *Public Prosecutor v Yap Kok Meng* [1974] 1 MLJ 108 and *Paramasivam v Public Prosecutor* [1970] 2 MLJ 106.

[13] According to counsel the Evidence Act is a code and it will not be possible therefore to interpret s 118 as having the effect that the defendant advances. The section has to be construed strictly. The case of *Public Prosecutor v Yuvaraj* [1969] 2 MLJ 89 and *Datin Siti Hajar v Murugasu* [1970] 2 MLJ 153 are cited in this connection:

(a) *Public Prosecutor v Yuvaraj:*

> In Malaysia, as in India, the law of evidence has been embodied in a statutory code: the Evidence Ordinance. In so far as any part of the law relating to evidence is expressly dealt with by that ordinance the courts in Malaysia must give effect to the relevant provisions of the ordinance whether or not they differ from the common law rule of evidence as applied by the English courts … (at p 90 of the report).

(b) *Datin Siti Hajar v Murugasu:*

> The rule of construction is that an amending and consolidating Act implies both addition to, and derogation from, the pre-existing law, but such an Act is a complete code in itself as regards the subject it deals with. This appears to be the resulting implication of the views of Lord Herschell in *Bank of England v Vagliano Brothers* in the Privy Council … (at p 156 of the report).

[14] Counsel also refers to the Court of Appeal Hong Kong decision in *Wong Sun v Insider Dealing Tribunal* (CACV 153/2000) and advances an argument that even in a criminal case a trial can proceed and be completed in the absence of the accused. Since this is the position in a criminal case, the principle applies a fortiori to a civil case such as the present. In *Wong Sun*'s case (which was an

insider trading case heard by Insider Trading Tribunal of Hong Kong at first instance), the tribunal had refused an application for adjournment on ground of ill-health, noting that the appellant had been given considerable time by the tribunal to regain his health. The Hong Kong Court of Appeal observed:

> One of the considerations for the tribunal in deciding to continue without the oral evidence of the appellant is the extent to which the defence of the appellant might have been handicapped by the absence of the oral evidence of the appellant … The tribunal had applied the law correctly and had considered all the relevant circumstances. Its conclusion that the proceedings should continue despite the appellant's inability to give oral evidence at the inquiry cannot be faulted (per Leong JA).

THE DEFENDANT'S GROUNDS

[15] Encik Razlan, counsel for the defendant, submits the first question the court should ask is whether the plaintiff is competent or otherwise. Counsel starts by stating that the defendant likewise is not challenging the expert evidence of PW1, the plaintiff's personal doctor, but notes Dr Tan has a 'therapeutic alliance' with him and as such of the doctor's testimony presumably should be viewed in this light. PW1, according to counsel, is a competent witness because by s 118 of the Evidence Act, a witness by statute shall be regarded as competent if he can give rational answers. Dr Prem has explained two situations, namely the situation of a witness being 'fit to plead' as against the situation of the witness being 'fit to stand trial'. Counsel advances the argument that by this definition PW1 is fit to plead but not necessarily fit to stand trial. At this point in time, counsel advances his argument that the plaintiff is presently not suffering from these dissociative symptoms. A possible way out, according to this argument, will be to find ways and means to alleviate any undesirable effects, should cross-examination be continued. Counsel submits because Interpretation Act does not limit the 'physical appearance' of the court, a 'court' by s 3 of the Interpretation Act can also mean a location such as his house or even any other location with a video link. Counsel suggests that the video link can be utilised here.

EVALUATION

[16] I have considered all the arguments submitted in this case before me, and evaluated very carefully the two psychiatric reports and the testimony of the two experts in court. I find certain common grounds in the psychiatric reports and in the testimony. It is beyond dispute that the plaintiff is suffering from a severe depressive disorder. The plaintiff further has a proven medical history of depression, and he has in the past taken a long time to recover from his depressive disorder. It is also agreed that the triggering cause of his present depressive disorder is the present ongoing trial. The issue that remains for this

court to evaluate is whether the risk of the plaintiff suffering or relapsing into a more severe medical condition, is something that can be tolerated or permitted by this court. Neither Dr Tan nor Dr Prem is on record as saying he might not suffer worsening symptoms of acute depressive disorder if he is subject to the trial process. Dr Prem even suggests that the best way out is perhaps for him not to attend the trial. Dr Tan states very categorically that it is not the method of cross-examination or the location of the cross-examination that is the determining factor but the nature of the questions posed to him in a trial environment. I believe it important in this process of evaluation to assess not only the strict legal requirements of the law, the provisions in the Evidence Act, or case authorities across numerous jurisdictions; it is also important to seriously consider the harm that will be caused to the plaintiff should this court order that his cross-examination continue. The risk that he will suffer, or relapse into a more severe medical condition, has to be balanced against other factors which naturally will include any possible prejudice that might be caused to the defendant. On this I readily agree with Mr Wong's submission that the prejudice will be on the plaintiff himself if he chooses not to continue with cross-examination. The weight to be attached to his testimony will be a matter for this court's assessment, I might add after hearing submissions by both counsel. The available authorities even go so far as to establish the principle that if the testimony is not so far advanced, the court might even disregard the testimony. It will be up to counsel to persuade this court on the weight the court should attach to the testimony, or for it to be disregarded altogether. I also note Mr Wong's submission that there is another alternative available to the defendant, namely to submit no case to answer at the conclusion of the plaintiff's case, and it will be up to this court then to decide whether to allow or dismiss that application of no case to answer. On the issue of whether the plaintiff is a compellable witness, assuming he is competent witness, I believe the law on this is well-established. A party to litigation, in this case the plaintiff, cannot be compelled to come to court as a witness. The right is that of a party who to call as his witnesses. To agree with the defendant's submission on the basis that s 118 will extend even to a party to litigation will be to upset the adversarial system of litigation.

[17] Some mention must be made of the alternatives suggested by counsel for the defendant. Although 'court' is not defined by s 3 of the Interpretation Act in terms of physical location or normal attributes of a court, and by this token the cross-examination of the plaintiff can be conducted in chambers, or at this house, or in any other physical location made open to the public, that with respect is not the immediate issue to comprehend and to decide. Dr Tan's testimony on this has to be respected. It is not the physical location that is the critical issue here. It is the entire atmosphere and the questions asked in a trial environment that has triggered his depressive disorder. I will be not so bold as to suggest that a video link in a more conducive atmosphere, or any of the other alternatives suggested (including the possibility of allowing a written

cross-examination procedure), will not worsen the plaintiff's present medical condition. In short, it will be just too risky. The court in this instance has to look beyond strict black letter law and juristically pure case authorities and clothe the problem at hand with the necessary human attributes.

CONCLUSION AND ORDER

[18] The plaintiff here is an 80 year old man with a serious medical condition, and the family has indicated their request that he should not be subjected to the further stress that the trial process will bring on him. On the law, the trial can still proceed without the plaintiff. The applicable principles are well laid down by our Federal Court in *Dr Shanmuganathan*'s case. As such I am of the opinion and so I rule, the plaintiff can elect not to proceed with the further cross-examination. It will be up to parties to submit to this court at the appropriate stage what weight this court should attach to his testimony.

[19] In the premises, I am directing the parties to provide their common dates soonest possible so that this action can proceed to a speedy conclusion.

Order accordingly.

Reported by Ibnu Aswan